# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>October 31, 2006 |
| v | No. 261410<br>Wayne Circuit Court |
| ROBERT REESE,<br><br>Defendant-Appellant. | LC No. 04-011272-01 |

Before: Whitbeck, C.J., and Saad and Schuette, JJ.

PER CURIAM.

I.

Defendant appeals his convictions for second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. The court sentenced defendant as a third habitual offender, MCL 769.311, to 37½ to 62½ years' imprisonment for the second-degree murder conviction and to a consecutive term of two years' imprisonment for the felony-firearm conviction. We affirm.

The prosecutor charged defendant in connection with the shooting death of Eugene Johnson, the fiancé of his ex-girlfriend, Vernail Durr. At trial, defendant admitted shooting Johnson, but claimed that he acted in self-defense and that he only fired after Johnson had fired at him. Other than defendant's testimony, no evidence was presented to support defendant's claim that Johnson carried or fired a weapon at the time of the fatal shooting. Moreover, the results of gun-residue tests performed on Johnson and defendant were consistent with defendant being the shooter and Johnson the victim. For example, the prosecutor presented evidence that the spent casings found at the scene and a bullet recovered from Johnson's body were fired from the weapon found at defendant's home.

II.

Defendant argues that he was denied due process when the trial court instructed the jury, pursuant to CJI2d 16.21, that his state of mind could be inferred from the circumstances surrounding the alleged killing, that intent to kill could be inferred from the use of a dangerous weapon in a way that was likely to cause death, and that it could be inferred that he intended the usual results that follow from the use of a dangerous weapon. Defendant contends that these instructions could have been construed as a conclusive presumption and that it impermissibly

shifted the burden of proof to him with respect to his claim of self-defense. Defendant additionally argues that he was denied due process when the trial court failed to *sua sponte* instruct the jury, consistent with *People v Atkins*, 397 Mich 163; 243 NW2d 292 (1976), concerning the unreliability of "drug addict testimony." Defendant claims that such an instruction was necessary because Durr was a "self-confessed drug addict" whose testimony provided the sole basis for a finding of guilty in this case.[1]

Defendant has waived both of these claims of instructional error and is not entitled to appellate review. "In order to properly preserve an issue for appeal, a defendant must 'raise objections at a time when the trial court has an opportunity to correct the error . . . .' " *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006), quoting *People v Grant*, 445 Mich 535, 551; 520 NW2d 123 (1994). Thus, a party must challenge a jury instruction at trial to preserve the issue for appeal, *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000), and the failure of the court to instruct on any point of law is not ground for setting aside the verdict of the jury unless the instruction is requested by the accused, MCL 768.29; *People v Young*, 472 Mich 130, 139; 693 NW2d 801 (2005). See also MCR 2.516(C). Moreover, a party waives review of the propriety of jury instructions when, as here, he approves the instructions at trial. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Importantly, here, defendant affirmatively waived his claims of instructional error by explicitly approving the instructions that were given by the trial court. Indeed, defense counsel expressly advised the trial judge that he was "satisfied" with the instructions.

Finally, at the evidentiary hearing on remand, defendant failed to show that he was denied the effective assistance of counsel at trial. *People v LeBlanc*, 465 Mich 575, 578-579; 640 NW2d 246 (2002); *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). As the trial court noted, there was no evidence that an audiotape of a 9-1-1 call existed and the police report contained no reference to such a call. Additionally, counsel did challenge the results of the gunshot residue tests. Those tests simply came back inconclusive as to the victim. Hence, there was no showing that counsel performed below an objective standard of reasonableness and that defendant suffered prejudice as a result. *LeBlanc*, *supra*; *Carbin*, *supra*.

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Bill Schuette

[1] We note that defendant has offered no record support for the assertion that Durr was a "self-confessed addict;" we further note that her testimony was hardly the sole evidence connecting defendant with the crime. Moreover, the *Atkins* Court specifically rejected the very claim advanced by defendant, holding that although a cautionary instruction may be appropriate "where the uncorroborated testimony of an addict-informer is the only evidence linking the accused with the alleged offense," there "*must be a proper request*" for such an instruction. *Id.* at 170-171 (emphasis in original).